Report and Recommendations

of the

2003 ALBERTA JUDICIAL COMPENSATION COMMISSION

PRESENTED TO THE

MINISTER OF JUSTICE AND

ATTORNEY GENERAL AND

THE ALBERTA PROVINCIAL

JUDGES ASSOCIATION

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I. COMMISSION'S APPOINTMENT AND TERMS OF REFERENCE

The 2003 Alberta Judicial Compensation Commission ("2003 Commission") was established pursuant to the *Judicature Act* and the *Alberta Provincial Judges Compensation Commission Regulation 202/2003* ("Regulation") (Appendix 1). The Regulation sets out the terms of reference for the 2003 Commission.

A. Role of the 2003 Commission

The role of the 2003 Commission is set out in section 2(1) of the Regulation:

> 2(1) The Commission must make recommendations respecting the compensation of judges.
>
> (2) The Commission must determine issues relating to compensation independently, effectively and objectively.
>
> (3) The Commission is to contribute to maintaining and enhancing the independence of the court and the judges through the inquiry process and its report.

To do so, the 2003 Commission must conduct an inquiry respecting:

(a) the appropriate level of compensation for judges sitting full or part time or on a supernumerary basis,

(b) the appropriate design and level of judges' pension benefits of all kinds,

(c) the appropriate level and kinds of benefits and allowances of judges, and

(d) any other issues relevant to the financial security of the judges that the 2003 Commission agrees to resolve.

B. Composition of the 2003 Commission

The 2003 Commission consists of three members who were appointed by Ministerial order of the Honourable Dave Hancock, Q.C., Minister of Justice and Attorney General (the "Minister") on November 6, 2003:

Stephen Hart Wood, Q.C., who was appointed by the Minister on nomination by the Alberta Provincial Judges' Association ("Association"),

David Jonathan Corry, who was appointed by the Minister, and

Daniel McKinley, F.C.A., who was appointed by the Minister on nomination by the first two appointees. Mr. McKinley is the Chair of the Commission.

II. 2003 COMMISSION RECOMMENDATIONS

The recommendations of the 2003 Commission are effective for the period April 1, 2003 to March 31, 2006. The recommendations are binding on the Government of Alberta unless the Lieutenant Governor in Council provides the Association with written reasons for the rejection or modification of the recommendations in whole or in part within 90 days of the date of the report.

The legal authorities regarding the independence of the judiciary and judicial compensation make it clear that the Association and the government are required to put forward before the 2003 Commission their best case and their

best justifications for their position. It is the role of the 2003 Commission to carefully weigh the evidence and the submissions and recommend the proper compensation and benefits package for the Provincial Court judges. The government must give valid and cogent reasons to vary from the recommendations and cannot treat the recommendations as merely advisory.

It is clear from the Regulation, and the relevant legal authority, that the 2003 Commission has a central role in the establishment of judicial compensation. The role of the 2003 Commission requires that it carefully consider all of the factors that go into judicial compensation. The 2003 Commission is not bound by the decisions of prior commissions, but must decide what is currently appropriate compensation and benefits in light of the current facts as presented to it and after considering the various factors prescribed by the Regulation.

SUMMARY OF RECOMMENDATIONS

The 2003 Commission has carefully considered our role and all of the factors pursuant to section 14 of the Regulation, all of the submissions filed, all of the evidence called, and the oral submission received. The 2003 Commission unanimously recommends that the salary, pension and other benefits of the judges of The Provincial Court of Alberta effective from April 1, 2003 until March 31, 2006 be as follows:

Salaries

Period	Salary
April 1, 2003 – March 31, 2004	$200,000
April 1, 2004 – March 31 2005	$210,000
April 1, 2005 – March 31 2006	$220,000

Assistant Chief Judges should continue to receive an additional $7,500 per year and the Chief Judge should continue to receive an additional $15,000 per year. We also recommend that the salary of a judge whose appointment as Chief Judge or Assistant Chief Judge expires after April 1, 2003 not be reduced and that his or her salary remain unchanged until the salary of a judge of the Alberta Provincial Court not holding those appointments exceeds his or her salary.

Pensions

We find the current pension plan of the Alberta Provincial Court judges is appropriate and we therefore do not recommend that there be any changes to the plan

Benefits

- The professional allowance should be increased to $3,000 per year. There should be no carry forward for any unused allowance.
- Long-term disability benefits should be indexed to increase at 60% of the Consumer Price Index for Alberta per annum commencing April 1, 2003.

- Based on the submission of the Minister, and noting that the Association has no objection to this proposal, the 2003 Commission recommends that the "Judges 70 + Benefits Program" be implemented subject to the following changes:

  - Judges who have been reappointed by the Lieutenant Governor in Council have the right to change coverage only at "choice times" described by the Alberta Personnel Office document entitled "1st Choice: A benefits program for managers and non-union employees" and not on an annual basis. Choice times occur in odd numbered years. This means that a judge who was reappointed for the first time in January 2004 and was reappointed in January each of 2005, 2006 and 2007 must enrol in the Judges 70 + Benefits Program within the period set out in the Judges 70 + Benefits Program in 2004 and would be entitled to review and change benefits, within the 1st Choice rules, in 2005 and 2007, but not 2006.

Supernumerary Judges

Supernumerary judges should be paid the following per diem rate for each sitting day and each sitting day cancelled with less than 24 hours notice:

Period	Per Diem
April 1, 2003 – March 31, 2004	$1,000
April 1, 2004 – March 31 2005	$1,030
April 1, 2005 – March 31 2006	$1,060

We do not recommend any payment for educational seminars sponsored by the Association.

Retired Judges

Based on the joint submission of the Minister and the Association we recommend that the Minister explore two options regarding benefits for retired judges:

- First, coverage could be provided under a program separate from the senior civil servants group health plan under an administrative services only arrangement. The premium rates would be at a level that covers the costs associated with the experience of the group of retired judges plus administrative costs. There would be predetermined participation rules and some coverage may not be available or limited.

- Second, a health benefits package could be designed and insurers and providers of group health plans invited to provide proposals.

Under either option administrative services may be provided by the insurer or service provider and the premiums could be deducted from the judge's pension.

Motor Vehicle Allowance

We recommend that judges be entitled to claim a motor vehicle allowance of $0.38 per kilometre as currently allowed by the Alberta government and as increased from time to time by government regulation.

- We recommend that the judges be entitled to claim any extra insurance premiums required because of extensive driving to circuit courts without a cap of $300.

Costs

We recommend that the Association be allowed its reasonable solicitor/client costs incurred in participating in the 2003 Commission process. In the event that there is any dispute over the costs, the 2003 Commission reserves the right to review the Association solicitor and client accounts, receive submissions from each counsel and set appropriate costs to be paid.

Masters in Chambers

We do not recommend a clothing allowance for Masters in Chambers. We believe that the recommended increase in salary should cover any additional expenses incurred.

The reasons of the 2003 Commission in support of the above recommendations are set out below.

III. CONDUCT OF THE 2003 INQUIRY

Notice of the establishment of the 2003 Commission, the public hearing dates and closing date for written submissions was published on Wednesday November 19th, 2003 in the Calgary Herald, Calgary Sun, Edmonton Journal and Edmonton Sun (Appendix 2). Public hearings were held in the Alberta Court of Queen's Bench in Calgary on December 8th, 9th and 15th, 2003. Prior to the commencement of the public hearings, the 2003 Commission received the following written submissions and exhibits:

1. Submission from "CORE" Confederation of Regions Political Party of Alberta.

2. Letter from the President of The Law Society of Alberta, Ms. Cheryl Gottselig, Q.C.

3. Letter from the President of the Canadian Bar Association-Alberta Branch, Mr. Donald Higa.

4. Submission from the Masters in Chambers.

5. Submission from the Association including a pension brief and a reply brief, together with extensive supporting authorities and material.

6. Submission from the Minister of Justice and Attorney General for Alberta, including a reply submission and extensive authorities and other material.

The 2003 Commission has carefully reviewed the written submissions that were filed. The written submissions were thorough and extremely helpful in the 2003 Commission's deliberations. In particular, counsel for the Association, Messrs. Donnel O. Sabey, Q.C. and Bradley G. Nemetz, Q.C., of Bennett Jones LLP, and counsel for the Minister, Mr. Thomas W. Wakeling, Q.C. and Ms. Barbara B. Johnston, are to be commended on their very carefully considered and extensive written briefs and the detailed supporting authorities and other material. Without their diligent and complete preparation and presentation, it would have been very difficult for the 2003 Commission to have conducted and completed its deliberations in an efficient and timely fashion.

On December 8 and 9, 2003, Mr. McKinley asked whether any members of the public wished to make any oral submissions. There were none. The Association called upon the following witnesses to provide evidence to the 2003 Commission at the public hearings on December 8 and 9, 2003: Judges Lynn Cook-Stanhope, Fred Coward, Gerald DeBow, Norman Hess, Assistant Chief Judge Brian Stephenson and Mr. Allan Tough, the latter being an agreed expert on pensions and other benefits plans.

On December 9th, 2003 the 2003 Commission heard representations from Master Keith Laycock on behalf of the Masters in Chambers.

On December 15th, 2003 the 2003 Commission resumed its public hearing at the Calgary Court House and heard submissions from counsel on behalf of the Association and counsel for the Minister.

IV. CONTEXT OF THE 2003 INQUIRY

This is the third judicial compensation commission in Alberta. The first and second commissions presented their reports and recommendations on June 19, 1998 and July 31, 2003 respectively.

Recommendations of the 2000 Commission

The Report and Recommendations of the 2000 Judicial Compensation Commission ("2000 Commission") adopted the changes jointly proposed by the Minister and the Association, and dealt with matters respecting other benefits and allowances. The 2000 Commission recommended the following:

Salaries

- for the period April 1, 2000 to March 31, 2003 salaries for

  (b) Judges should be $170,000 per year

  (c) Assistant Chief Judges should be $177,500 per year, and

  (d) the Chief Judge should be $185,000 per year.

Pensions

- the contribution rate should be reduced from 9% to 7% effective April 1, 2000

- the accumulation rate should be increased from 2.67% per year to 3% per year for each year of judicial service after April 1, 2000

- for judges who retire after April 1, 2000 the penalty for early retirement on pension benefits earned after April 1, 1998 should be the greater of:

    (i) 3% of those benefits for every year of retirement before the age of 60, or

    (ii) 3% of those benefits for every year less than the total of the Judge's age in years plus the Judge's years of judicial services deducted from 80 (the rule of 80)

- increase the maximum pension ceiling from 66 2/3% to 70% effective April 1, 1998

- for the period January 1, 1992 to March 31, 1998 the pension benefits earned by a judge should be calculated and paid without:

    (i) any capping of pensionable salary less than the actual salary earned by the judge during that period

    (ii) any reduction in survivor benefits to less than 75%, and

(iii) any penalty (introduced by amendments to the *Income Tax Act* (Canada) which came into force on January 1, 1992) for early retirement after the age of 55

- survivor's benefits should continue at 75% from April 1, 1998 onwards

Allowances

- judges should be allowed an accountable (non-taxable) professional allowance of $2,500 per year beginning April 1, 2000.

All the recommendations of the 2000 Commission were accepted by the Government of Alberta and have been effective for the period April 1, 2000 to March 31, 2003.

V. SUMMARY OF SUBMISSIONS AND EVIDENCE

There was considerable disparity in the submissions of the Association and the Minister regarding recommended salary, pensions, benefits and amounts to be paid to supernumerary judges and reappointed judges. As a result, the role of the 2003 Commission to determine the issues relating to compensation and benefits independently, effectively and objectively was a challenging one. The following is a summary of the submissions and evidence received and heard by the 2003 Commission.

A. Association Submission

The Association submitted that the salary and benefits recommended by the 2003 Commission should be the following:

Salary

- $210,000 per annum indexed annually at 100% of Statistics Canada, Consumer Price Index for the Province of Alberta (hereinafter "Alberta CPI")
- Chief Judge to receive an additional 12.5%
- Assistant Chief Judge is to receive an additional 6.25%

Pensions

- Harmonization of all Provincial Court judges' pensions by eliminating fragmented pension calculation and applying the same accumulation rate to each year of judicial service and using the last year's income as the pensionable salary
- increasing the accumulation rate to 3.5%
- basing pensions upon 70% of salary at time of retirement (pensionable salary)
- indexing pensions to 100% Alberta CPI

Benefits

- Long term disability – benefits to be 70% of judicial salary of a sitting judge until eligible for retirement at full pension, retirement or death
- Professional allowance – increased to $3,750 per annum with ability to accumulate the unused portion forward one year
- Initiate immediate repayment of certain prior pension contributions

Supernumerary Judges/Reappointed Judges

Supernumerary Judges

- Be paid 1/175 of a sitting judge's salary for each sitting day, each sitting day cancelled with less than 24 hours notice, and for each day (to a maximum of three per year) spent an educational seminar sponsored by the Association

Reappointed Judges

- Receive the same benefits received for sitting judges with the exception of life insurance, long-term disability and limited medical coverage

Other

- Provide to retired judges and supernumerary judges the opportunity to participate in the medical, dental and prescription drug plans available to sitting judges

- Motor vehicle allowance

Costs

- Payment of all reasonable costs incurred by the Association in these proceedings

The submissions of the Association were extensive. The Association reviewed in detail the role of the 2003 Commission including the history of the Commission process, the mandate of the 2003 Commission, the history of the Provincial Court and the role of a judge.

The 2003 Commission accepts the following submission of the Association at p. 24 of its written submissions. This passage accurately describes the dedicated role and duties of a Provincial Court judge, and was consistent with the evidence of those Provincial Court judges who testified before us:

> A Provincial Court judge's work is varied, complex and ever changing. The proper discharge of the office requires attention to detail, sensitivity and adaptability. The judge is called upon to be alert both to the issues unfolding before him or her, and to the impressions that will be drawn by the public from the court's conduct. The judge must be mindful of his or her role as the embodiment of the judicial system in the eyes of the public. The judge must maintain the public's confidence in the judicial system,

> but must not, in seeking the public's confidence, stray from the law as set down by the legislators. Where the legislators have left the matter to the discretion of the court, or where they have spoken in generalities requiring the court to provide the specifics, the judge must undertake those tasks in conformity with binding legal principles. The judge must resist pressures to attract broad public support, or more likely, avoid negative publicity/press reaction at the cost of an honest application of the law. Finally, the judicial position requires the judge to honour the trust imposed upon him or her; the trust which results from the privilege society has bestowed in permitting the judge to make decisions, often life-altering, about his or her fellow citizens.

The Association's submission then extensively examined the jurisdiction of the Provincial Court. In particular the submission outlined the expanding jurisdiction of a Provincial Court judge and the extent to which its scope has increased in recent years. At p. 24 of the Association's submission it states:

> There are two aspects of this jurisdiction: its scope; and the extent to which its scope has increased in recent years. Both of these aspects bear directly upon the question of compensation because they reflect the increasing responsibility attaching to the office of a judge. They raise squarely the question of the relationship of a Provincial Court judge's compensation and that of a Queen's Bench judge given the duties and responsibilities of each of these Alberta courts.

The 2003 Commission accepts the Association's submission in this regard. The Association's submission emphasized the expanding criminal law jurisdiction and the significance of the *Canadian Charter of Rights and Freedoms* and the decisions that must be made by provincial court judges involving the *Charter*. In addition to its historical jurisdiction, new legislation has significantly impacted the jurisdiction and the complexity of the role of the provincial judges. This new legislation and expanding jurisdiction includes the *Victim's Restitution and Compensation Payment Act*, S.A. 2001 c. V-3.5, the increase in the monetary

jurisdiction of the Provincial Court – Civil Division to $25,000 (with authority to increase it further to $50,000), expanded remedial jurisdiction, the landlord and tenant jurisdiction, family law jurisdiction, child protection, secure treatment proceedings and the *Youth Criminal Justice Act* which came into force on April 1, 2003.

The Association then compared the role of the Alberta Provincial Court judges and the Alberta Queen's Bench judges. In that regard the Association submitted (at p. 49):

> With the far ranging jurisdiction of the Alberta Provincial Court the historical marked differences between the Provincial Court and the Court of Queen's Bench have changed significantly, both with the adoption of the *Charter or Rights and Freedoms* and the ever expanding jurisdiction of the Provincial Court. Each position retains some aspects unique to it, but at the end of the analysis one is driven to conclude that Provincial Court judges and Court of Queen's judges are both trial judges, and generally perform the equivalent functions. The trial process before a Provincial Court judge is indistinguishable from the trial process before a Court of Queen's Bench, except in the infrequent instance of jury trials. In respect of indictable criminal matters, one appeals directly from the trial court, whether it is the Provincial Court or the Court of Queen's Bench, to the Court of Appeal. Only summary conviction appeals are made from the Provincial Court to the Court of Queen's Bench; on the more serious cases the Court of Queen's Bench has no appellant function and appeals from the Provincial Court go directly to the Court of Appeal. Provincial Court judges and Court of Queen's Bench judges both exercise the civil, criminal and family law jurisdiction. Monetary jurisdictions differ, but the legal principles applied to resolve the legal issues are the same. The law is the same for all judges and the issues before them are as complicated, regardless of the court in which they sit.

In its compensation submission the Association submitted that when the preceding discussion of the role and importance of the Provincial Court is

considered in light of the criteria to be considered by the 2003 Commission, and giving particular weight to the need to attract qualified candidates and the equivalency of the Provincial Court and the Alberta Court of Queen's Bench, the recommendations of the Association are appropriate and should be accepted by the 2003 Commission.

The Association then provided detailed submissions on the various factors that the 2003 Commission must consider pursuant to section 14 of the Regulation.

With respect to pensions, the Association submitted that from April 1, 2003 all judges retiring thereafter should be entitled to a pension:

(a) based on the number of years service;

(b) multiplied by an accumulation rate of 3.5%;

(c) applying that percentage number (not to exceed 70%) to the judicial salary of the date of retirement; and

(d) indexing the pension benefits at 100% of the Alberta CPI.

Extensive submissions were provided in support of the Association's recommendation in that regard, including a detailed actuarial report which examined and set out the estimated actuarial and actual costs of the pension recommendation prepared by Ms. A. Kim Young, FSA, FCIA of Mercer Human Resources Consulting. Mr. Allan Tough, who was accepted as an expert on pension design and implementation, testified that the Association's submission

on pensions was appropriate and fair given the stated objective of designing a plan that would permit a majority of judges in the Provincial Court to obtain a full pension of 70% of final salary after 20 years of service.

In regard to the office of the supernumerary judge, the Association recommended that the per diem compensation paid should be increased for a fraction of 1/175 of the current salary for each sitting day or day assigned by the Chief Judge, that the supernumerary judge should receive a per diem for up to three days to attend educational seminars, and be paid a full day's per diem in the event that a hearing is cancelled with less than 24 hours notice.

As to the professional allowance of Provincial Court judges, the Association submitted that it should be increased to $3,750 per year and that the unexpended portion up to the whole of any one year's professional allowance, may be carried forward to the next year.

B. Government of Alberta Submission

The Minister proposed changes to the existing compensation of members of The Provincial Court of Alberta to relate to salary, one to the professional allowance and one to pensions. The submission of the Minister proposed that the other terms of service remain the same.

The Minister proposed that the salaries of the Chief Judge, an Assistant Chief Judge, a Judge and a Master in Chambers be set at levels effective the date listed below:

Position	April 1, 2003	April 1, 2004	April 1, 2005
Chief Judge	$190,100	$195,353	$200,764
Assistant Chief Judge	$182,600	$187,853	$193,264
Judge	$175,100	$180,353	$185,764
Master in Chambers	$175,100	$180,353	$185,764

The Minister proposes that the salary of a judge whose appointment as Chief Judge or Assistant Chief Judge expires after April 1, 2003 not be reduced and that his or her salary remain unchanged until the salary of a judge of the Alberta Provincial Court not holding an appointment as Chief Judge or Assistant Chief Judge exceeds his or her salary.

The Minister proposes that the annual professional allowance be increased from its current level of $2,500 to $3,000 effective April 1, 2003.

The Minister also proposes that the judges of the Alberta Provincial Court contribute a larger percentage of their salary into the Provincial Judges' and Masters in Chambers Registered Pension Plan. The current contribution rate is 7%. The submission noted that the contributions of the civil service increased from 4.675% to 6.55% of salaries. Management contributions have moved from 7.75% to 9.5%.

The Minister's submission outlined the governing constitutional principles and the role of a judicial compensation commission. At p. 17 of its submission the Minister stated the following:

> These points allow one to fairly conclude that a government must make a proposal on the proper level of judicial compensation to a judicial compensation commission, that a representative of the judiciary may make a proposal, although under no constitutional duty to do so, and that a judicial compensation commission, before it submits its report to the executive or legislative branch, must make the necessary inquiries to satisfy itself that the commission understands
>
> (a) the constitutional role assigned to it by the Constitution of Canada;
>
> (b) the features of the existing compensation level of the judges whose compensation is under review;
>
> (c) the features of the government's proposal and how the government's proposal alters existing judicial compensation;
>
> (d) the features of the judge's proposal and how the judge's proposal alters existing judicial compensation; and
>
> (e) the objective criteria which justify the proposals of the government and the judges, if any.
>
> If objective criteria support the government's proposal, a judicial compensation commission should incorporate the terms of the government's proposal into its report. This approach comfortably reconciles the conventional principle that the political units of government are primarily responsible for the allocation of government funds and the new constitutional norm obliging an independent judicial compensation commission to produce recommendations based on "objective criteria, not political expediencies".

The Minister then submitted that its proposal falls within the constitutional range of compensation and supports "public confidence in the independence of the judiciary". The Minister submitted that if the 2003 Commission were to adopt its proposal then the independence of the judiciary would not be undermined. The Minister submitted that if the 2003 Commission concludes that Alberta's proposal is supported by objective criteria it should recommend to the Minister

and the Judges' Association that the compensation of a judge of The Provincial Court of Alberta be changed to incorporate the Minister's proposal.

We did not accept the Minister's submission in this regard. Regardless of whether or not the Minister's proposal might be supported by objective criteria, this 2003 Commission did not feel compelled to recommend to the Minister that the compensation of a judge of The Provincial Court of Alberta be changed to incorporate the Minister's proposal. We were unanimously of the view that this set out the wrong test.

The role of the 2003 Commission is set out in section 2 of the Regulation. This 2003 Commission must clearly make recommendations respecting the compensation of judges. This 2003 Commission must clearly determine issues relating to compensation independently, effectively and objectively. This 2003 Commission must contribute to maintaining and enhancing the independence of the court and the judges through the inquiry process and its report. Our constating Regulation mandates this. All of the weight of the constitutional authority mandates this.

For all of the above reasons, we reject the Minister's submission urging us to recommend the government's proposal if it is supported by objective criteria. It is not in accordance with the role of the 2003 Commission as mandated by the Regulation. It is not in accordance with the role of this Commission as mandated by the constitutional authority: *Re Provincial Court Judges*, [1997] 3 S.C.R. 3; *Alberta Provincial Judges' Association v. Alberta* (1999), 236 A.R. 251

(Q.B.); affirmed (1999), 177 D.L.R. (4th) 418 (Alta. C.A.). It is the role of this 2003 Commission to be independent, effective and objective. It is the 2003 Commission's role to determine the appropriate level of compensation, appropriate design and level of judges' pension benefits and the appropriate level and kinds of benefits and allowances and other issues relevant to financial security of judges. This is not the Minister's role. If we had carried out our duties as urged by the Minister in his submission, it could have exactly the opposite result than that which was intended by our courts. That is, it would politicize the process. The whole point of the commission process is to depoliticize the process.

We are therefore not prepared to accept the government's recommendations in their entirety. Some have merit, some do not. We must consider them, and have done so. We must also consider the evidence, and have done so. We must also consider the submissions and recommendations of the Association, and have done so. Then, after considering all of the submissions and the evidence, we must independently, objectively and effectively determine the compensation, pension, benefits and allowances for the period from April 1, 2003 to March 31, 2006.

The Minister's submission then reviewed the criteria set out in section 14 of the Regulation. In regard to section 14(d) of the Regulation, the Minister noted "the need to maintain a strong court by attracting highly qualified applicants". The Minister's submission emphasized that recent appointments of the Alberta Provincial Court judges and up-to-date candidate data confirms that leading

lawyers are willing to accept appointments as Alberta Provincial Court judges (see Tab 50 of the Minister's materials). The submission then reviewed the compensation of judges in Canada and compared the salary of Alberta judges to those in other provinces and to superior court judges appointed by the federal government. The Minister's submission noted that reference to the compensation of superior court justices is desirable. The Minister submitted that this ensures that any salary recommendation does not result in such a large gap between the compensation of the judge of the Alberta Provincial Court and the Court of Queen's Bench so as to discourage the best qualified and experienced lawyers from applying for positions on the Alberta Provincial Court. The Minister noted in its submission that there is no reliable evidence that qualified lawyers are reluctant to serve on The Provincial Court of Alberta.

The Minister's submission then went on to consider all of the remaining criteria that the 2003 Commission must consider pursuant to section 14 of the Regulation.

The Minister's reply submission argued that the Minister's proposal is more likely to contribute to the maintenance and enhancement of the independence of the Alberta Provincial Court than the proposal of the Association. This reply focussed on the appropriate pension benefits. The reply reviewed the background legal authorities regarding the constitution of Canada and the requirement for the provision of adequate judicial pensions, accepted that a good pension attracts highly qualified candidates, and argued that the existing pension for Alberta Provincial Court judges exceeds the minimum constitutional

standard. The submission then reviewed the existing pension plans for federally appointed judges and provincial court judges in other jurisdictions. The Minister submitted that the 2003 Commission has no jurisdiction to make retroactive recommendations regarding pension benefits which pre-date the effective date set out in section 9 of the Regulation.

We did not necessarily agree with the Minister's submission that the 2003 Commission has no jurisdiction to make retroactive recommendations regarding pension benefits which predate the effective date set out in section 9 of the Regulation but, given our recommendations, we did not need to decide that issue. However, we were not constrained by the Minister's submission regarding jurisdiction and pension benefits. We accept the Minister's submission in this regard, but very narrowly. We interpreted it to mean that the 2003 Commission could not make recommendations regarding pension benefits of those judges who retired prior to April 1, 2003. However, section 6(b) of the Regulation states:

> The Commission must conduct an inquiry respecting the appropriate design and level of judges' pension benefits of all kinds.

The 2003 Commission has made that inquiry and was unanimously of the view that, if the appropriate design and level of judges' pension benefits was not appropriate, we could make recommendations to improve the design and level of judges' pension benefits. We have not done so and therefore there was no need to decide this issue.

C. Masters in Chambers

In its submission to the 2003 Commission, the Masters in Chambers supported the Association submission and addressed an additional issue with respect to the provision of court room attire. The Masters in Chambers submitted that there be an additional court room attire allowance per annum to cover the cost incurred by Masters for purchase of business suits and accessories including suits, ties and shoes. Also, the cost of dry cleaning the attire should be authorized as an appropriate expense recoverable by the Masters in the same manner as judges in the Provincial Court and Queen's Bench.

D. Other Written Submissions

The other written submissions received by the 2003 Commission from the Confederation of Regions Political Party of Alberta, The Law Society of Alberta, and the Canadian Bar Association – Alberta branch were reviewed by the 2003 Commission.

In particular, the 2003 Commission has noted the following statements:

From The Law Society of Alberta:

> The Law Society is not an advocate for specific remuneration or benefit packages. It is submitted, however, that the Commission must be mindful of the objective of financial security as a component of judicial independence while at the same time insuring that judges receive compensation and benefits to provide financial security in the interests of judicial independence with a view to ensuring that outstanding candidates continue to be attracted to the bench.

The following submission of the Canadian Bar Association – Alberta was also noted:

> The Canadian Bar Association – Alberta submits that the Commission must ensure that judicial compensation reflects the high standards of public demands of our judiciary. Proper judicial compensation also maintains the integrity of the judicial system and ensures judicial independence.
>
> The provincial court is critical in shaping the administration of justice and the public perception of our system of justice. Recognizing that the quality of the provincial court bench is a product of the collective talent of those appointed, judicial compensation should be set at a level sufficient to attract pre-eminent members of the legal community.
>
> Compensation and benefits must recognize the economic, as well as the personal and professional realities of the transition from professional practice to the bench.
>
> Judges are faced with the daily task of making difficult decisions that significantly impact individuals, families and society. Decisions that are frequently controversial and subject to public and media scrutiny and criticism by virtue of the office, judges are often left defenceless against that criticism.
>
> The quality and strength of the bench will be maintained in the best interests of Albertans served, by establishing levels of remuneration paid to provincial court judges that is reflective of the stature, prominence and significance of the position.

The 2003 Commission accepts and appreciates the submissions of The Law Society of Alberta and the Canadian Bar Association – Alberta Branch.

VI. CRITERIA THE COMMISSION MUST CONSIDER

Section 14 of the Regulation states that in making its recommendations, the 2003 Commission must consider the following criteria:

(a) the constitutional law of Canada;

(b) the need to maintain the independence of the court and the judges;

(c) the unique nature of the judges' role;

(d) the need to maintain a strong court by attracting highly qualified applicants;

(e) the compensation of other judges in Canada;

(f) the growth and decline in real per capita income;

(g) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in Alberta and the overall state of the economy;

(h) the cost of living index and the position of the judges relative to its increases;

(i) the nature of the jurisdiction of the court and masters in chambers;

(j) the current financial position of the government;

(k) any other factors relevant to the matters in issue.

The 2003 Commission did consider the above criteria in making its recommendation.

(a) the constitutional law of Canada

Counsel for the Association and the Minister provided background material to the 2003 Commission which included the leading constitutional authorities *Re Provincial Court Judges*, [1997] 3 S.C.R. 3; *Alberta Provincial Judges' Association* v. *Alberta* (1999), 236 A.R. 226 (Q.B.) affirmed (1999), 177 D.L.R. (4th) 418 (Alta. C.A.). This material also included the report of the 2000 Judicial Compensation Commission (Alberta) and the 1998 Judicial Compensation Commission (Alberta). The head note of the Supreme Court of Canada decision summarizes the constitutional principles relied upon by Chief Justice Lamer in the majority decision:

> Since these appeals were argued on the basis of section 11(d) of the *Charter* they should be resolved by reference to that provision. The independence protected by section 11(d) is the independence of the judiciary from the other branches of government, and bodies which can exercise pressure on the judiciary through power conferred on them by the state. The three core characteristics of judicial independence are security of tenure, financial security, and administrative independence. Judicial independence has also two dimensions: the individual independence of a judge and the institutional or collective independence of court of which that judge is a member. The institutional role demanded of the judiciary under our Constitution is a role which is now expected of provincial courts. Notwithstanding that they are statutory bodies, in light of their increased role in enforcing the provisions and in protecting the values of Constitution, provincial courts must enjoy a certain level of institutional independence.
>
> ....
>
> ... the constitutional parameters of the power to change or freeze superior court judges' salaries under s. 100 are equally applicable to the guarantee of financial security provided by s. 11(d) to provincial court judges.
>
> Financial security has both an individual and an institutional dimension. The institutional dimension of financial security has

> three components. First, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased, or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, to avoid the possibility of, or the appearance of, political interference through economic manipulation, a body, such as a commission, must be interposed between the judiciary and the other branches of government. The constitutional function of this body would be to depoliticize the process of determining changes to or freezes in judicial remuneration. This objective would be achieved by setting that body the specific task of issuing a report on the salaries and benefits of judges to the executive and the legislature. Provinces are thus under a constitutional obligation to establish bodies which are independent, effective and objective. Any changes to or freezes in judicial remuneration made without prior recourse to the body are unconstitutional. Although the recommendations of the body are non-binding they should not be set aside lightly. If the executive or legislature chooses to depart from them, it has to justify its decision according to the standard of simple rationality - if need be, in a court of law.

(b) the need to maintain the independence of the court and the judges

We accept the submissions of the parties, and the proposition accepted by the courts and prior compensation commissions that judicial independence is the overriding and paramount principle to be considered in determining compensation of the Provincial Court judges. In the Association submission, it was noted that the need of society to maintain the independence of the judiciary was fundamental to the approach taken by the Supreme Court of Canada in the *Provincial Court Judges'* case, supra (see paras. 109, 111, 123-129.)

We noted the comments of the 1998 Judicial Compensation Commission which we adopt and accept:

First, we wish to underscore the point made by Chief Justice Lamer that "financial security is a means to the end of judicial independence and is therefore for the benefit of the public". In the words of Professor Friedland in A Place Apart: Judicial Independence and Accountability in Canada:

> Even if economic conditions were such that a very large portion of the bar was willing to accept an appointment at a much lower salary, we would still want to pay judges well to ensure their financial independence – **for our sake, not theirs** [emphasis added].

Second, we do not interpret the Supreme Court of Canada in the Provincial Court Judges' Case as prescribing or intending to prescribe a **minimum acceptable level of judicial remuneration** as the standard of compensation to achieve judicial independence in the circumstances before us. At issue in the Provincial Court Judges' case was the **reduction** of salaries by the executive branch, although the Court extended the guarantee of minimum salary to include reduction of salaries by inflation. In our view, what was said ten years ago in the report of the Ontario Provincial Courts Commission (Henderson) within the context of the Valente case, is equally valid today:

> [The] conception we espouse of independent judiciary goes beyond the minimum standard the Supreme Court of Canada enforced in Valente. At issue there was not the articulation of an **ideal standard** of independence for judges; the task instead was to ascertain the absolute **minimum conditions** sufficient to make a tribunal (which might or might not be a court) independent enough to try offence proceedings [Emphasis added].

Third, we are of the opinion that judicial independence cannot be achieved by a direct comparison of salaries of provincial court judges to anyone whose salary is paid by the Alberta government. Again, we refer to the 1988 Henderson report:

> [A further] consequence of our conception of judicial independence is that Provincial Court judges are not meaningfully comparable with anyone whose salary is paid by the Ontario government and who does not perform a judicial or quasi-judicial function. The fact that provincial civil servants' salaries, pensions or benefits are of a certain cost or value, are

> administered in particular ways or are subject to certain conditions, for instance, has nothing whatever to do with what compensation Provincial Court judges should receive, and vice versa. There may, of course, be respects or situations in which the compensation provided to judges and government employees will, coincidentally, be similar; all such similarities, though, require independent justification.

The Association in its submission emphasized that the need to maintain an independent judiciary should cause the 2003 Commission to place, little if any, weight on salary levels of government employees, be they administrative employees or elected officials. We have accepted this submission and have not placed any weight on the salary levels of government employees.

(c) the unique nature of the judges' role

The 2003 Commission considered the unique nature of the judges' role. The 2003 Commission has accepted the Association's submission that judges, and in particular the Provincial Court judges, spend much of their time adjudicating between the Crown and citizens. As such, a judge is the arbitrator of important constitutional rights of citizens and is the protector of those rights against the power and expanse of government. The 2003 Commission adopts the reasons of the Alberta 1998 Commission which said:

> In the end, it is the judge who must take away the liberties of the individual, sentence an individual to incarceration and adjudicate on issues of survival, security and development of children. No other member of our society has the same responsibility and authority of a judge.

We heard evidence from Judges Cook-Stanhope, Coward and DeBow regarding the unique nature of their role as Provincial Court judges and the high sense of personal duty and public service that they bring to their office. Each of them left private practice to serve as a judge. They gave up the autonomy and rewards of an interesting and often financially lucrative private practice. They were not motivated by monetary compensation or prestige. They were motivated by public service and public duty. They felt that they could make a difference in improving the quality of adjudication and the court process, so that it could better serve the public. Each has sacrificed a great deal to that notable public duty. Each has contributed a significant amount to the quality of adjudication in the Alberta Provincial Court and improving the court process.

Judges Cook-Stanhope and DeBow spoke of the increasing complexity of their roles and the delicate balance of judicial authority over the lives of the persons who appear before them. This is particularly heightened in matters involving young offenders, family law, child welfare matters and serious criminal offences. Day-to-day involvement in such cases, brings to the forefront all of the social challenges and tragic circumstances of our society, and takes a huge emotional toll on Alberta's Provincial Court judges.

We further note, that a provincial court judge cannot easily pursue another career, and in most cases, must continue as a judge until retirement, disability or death.

(d) the need to maintain a strong court by attracting highly qualified applicants

Section 14(d) of the Regulation mandates that the 2003 Commission consider the need to maintain a strong court by attracting highly qualified applicants. The 1998 Commission noted the following at pp. 33 and 34 of its report:

> We wish to emphasize the importance of **attracting** highly qualified candidates to the bench ought not overshadow the significance of two other fundamental principles in human resource management, **motivating** and **retaining** those individuals once appointed. If history and current practice are any guide, appointment to the bench is a long-term commitment, not a staging post. As of January 1, 1998, the average age of our provincial court judges was 57 years, 10 months and the average age of retirement was 66.4 years. If the level of compensation is inadequate to attract qualified applicants to the bench, one can hardly assume that it will be sufficient to motivate and retain judges who have been on the bench for twenty or so years.

The 2003 Commission has considered the importance of both attracting highly qualified candidates to the Alberta Provincial Court bench, as well as the importance of motivating and retaining those dedicated and committed Provincial Court judges that currently serve on the Alberta bench. The 2000 Federal Commission stated the following at p. 46 of its decision:

> What is required, in our view, is the striking of an appropriate balance in order to ensure that the judicial salary level was sufficient to continue to attract outstanding candidates to the bench, including outstanding candidates from the most lucrative of legal services markets in Canada, and that current and future judges serving in urban areas receive a fair and sufficient salary.

The Association's submission established that the average age of appointment in Alberta over the last ten years was 53 years of age. Of the appointments, 31 came from Calgary, 49 came from Edmonton and 27 came from other centres.

Eighty appointments came from private practice, 24 from government practice and 3 from other practice areas.

The 1998 Commission found that the average age of retirement was 66.4 years. The evidence before this Commission is that the average age of retirement is now 67.94 years. Therefore, the average length of service of an Alberta Provincial Court judge is 19.88 years given appointments at an average age of 53 years. There was no conclusive evidence as to why most judges retire in Alberta. Judge Coward and Judge DeBow both testified that they found their work challenging and rewarding and would continue unless their health required that they slow down or retire. Seven judges who are eligible for a full pension continue to serve on the Provincial Court bench.

The Minister's submission emphasized that there is no reason to be concerned about the quality of judicial appointments made by the Government of Alberta. The Minister submitted that a review of the press releases announcing recent appointments of Alberta Provincial Court judges and up-to-date candidate data confirms that leading lawyers are willing to accept appointments as Alberta Provincial Court judges and Masters in Chambers (Minister's Authorities, Tab 50). Of the eleven Provincial Court judges and the two Masters in Chambers appointed in 2003, eight held the designation of Queen's Counsel. Many of the appointments were from private practice, with a significant number coming from medium to large sized firms. Several held senior positions with Alberta Justice. The most junior appointment had 18 years at the bar and the most senior had 34.

We heard evidence that some excellent candidates for a Provincial Court appointment were reluctant to leave private practice. However, we accept the Minister's submission that we cannot place too much reliance on this evidence without questioning the candidates themselves as to why they apparently preferred a Queen's Bench appointment to a Provincial Court one. The reasons may vary considerably and some candidates may indeed not be primarily motivated by money.

Overall, we agree with the conclusions of the 2000 Federal Commission that the assessment of the adequacy of judicial salaries and benefits in relation to the incomes of private practitioners must take into account the following:

1. The total compensation of judges includes a significant pension annuity that has substantial value when a comparison of judicial compensation to the income of private practitioners is undertaken, particularly when most private practitioners must contribute to their own retirement plan through RRSPs;

2. The use of a uniform province wide salary scale for judges will have an adverse differential impact in different regions of the province and, therefore, potentially on the ability to attract outstanding candidates to the judiciary from some areas of the province (particularly Calgary and to a lesser extent Edmonton); and

3. While the judges' salaries should not be set according to the most lucrative legal services market, they must be set at a level which will not have a chilling effect thereby serving as a disincentive to outstanding candidates from

these areas where lawyers in private practice have among the highest incomes in Canada.

We also accept the Association's submission that to attract the best candidates one cannot offer compensation which is significantly below that paid to judges on the Court of Queen's Bench. The Minister's submission also stated that the "gap" cannot be too wide. We agree that there should be no significant financial disincentive for the best candidates to select the Provincial Court, where they can sit in a Division which is eminently suited to their interests, versus the Court of Queen's Bench, where only some of the cases will be handled within their area of interest or expertise. We agree that the justice system will be best served by minimizing the economic disincentive associated with applying for a Provincial Court position and will be enhanced by allowing prospective candidates the opportunity to select the court to which they are best suited without the choice being distorted by significant compensation differentials. However, we also recognize that even if the salary and benefits are similar, some lawyers may continue to prefer an appointment to the Queen's Bench or the Court of Appeal. We therefore do not think that there is anything that the 2003 Commission can do within its mandate to eliminate that personal preference.

(e) the compensation of other judges in Canada

We carefully considered the compensation of other judges in Canada. This included a review of compensation of the Provincial and Territorial Court judges

in Canada, as well as that of the superior court judges. We agree with the submission of the Minister that we must focus not only on the salary level of federally appointed judges, as well as other equally relevant comparator groups, but also on the salaries paid to other provincial court judges. In the Association's submission the comparison of the salary of the Alberta Provincial Court judges with other provincial court judges in other provinces raise certain theoretical and practical problems. Such a comparison runs the substantial risk of importing into the Alberta process the economic factors of other provinces. We agree with that submission.

The Association also submitted that one could, with some justification, say that the only comparable to Alberta, at the present time, is Ontario. The Association pointed out that, given that Alberta leads the rest of Canada, including Ontario, in most, if not all, relevant economic indicators, Alberta is in the best position to furnish its judges with an appropriate compensation package. In fact, Alberta is in a position to provide a compensation package that is equal to or higher than that paid to judges in other provincial jurisdictions.

The long awaited report of the Ontario Provincial Judges Remuneration Commission (2001) was issued and delivered to us on December 11, 2003. The hearings on the Ontario Commission (2001) commenced in late November, 2002 and were concluded on June 17, 2003, after 11 hearing days. The report was issued more than 5 months later. The Ontario Commission (2001) recommended changes to salaries and benefits for the period from April 1, 2001 until March 31, 2003. Majority and dissenting reports were issued. The salary

recommendations of the majority Ontario Commission (2001), compared to Alberta Provincial Court judges salaries are the following:

Period	Ontario	Alberta
Apr. 1, 2001 to Mar. 31, 2002	$185,000	$170,000
April 1, 2002 to March 31, 2003	$198,000	$170,000
April 1, 2003 to March 31, 2004	$202, 500 (plus cost of living)	TBD

The Association's submission argues that the federal jurisdiction is the most comparable. That is because it is the one jurisdiction which appoints judges from Alberta lawyers and where the positions to be filled are Alberta positions. The Association submits therefore that there exists clear and compelling reasons for the establishment of an Alberta salary broadly equivalent to that of federally-appointed judges who reside and work in Alberta.

The Association's submission at p. 67 provides the following table which illustrates the increasing salary gap between Alberta Provincial Court judges and Alberta Court of Queen's Bench judges:

Years	Salary Of Alberta Provincial Court Judge	Salary Of Alberta Queen's Bench Judge (Excluding Provincial Supplement Of $3,000 For Surrogate)	Percentage Difference	Dollar Difference
2000	$170,000	$198,000	85.9%	$28,000
2001	$170,000	$204,600	83.1%	$34,600
2002	$170,000	$210,200	80.9%	$40,200
2003	$170,000	$216,600	78.5%	$46,000

The Association submitted further that recognition of recent developments in function and responsibilities of a Provincial Court judge, supports the

Association's suggested salary of $210,000 (effective April 1, 2003). However, the Association emphasizes that the gap between the income of Provincial Court judges and Queen's Bench judges is even more significant when one considers the significantly better federal pension. The Association produced a report from Morneau Sobeco that shows, for the current federal judicial salary of $216,600, when increased to reflect the value of the much better Federal judicial pension, the judges receive a total economic value of $301,700. This is $44,400 more than the salary proposed by the Association for Alberta Provincial Court judges of $210,000 when taken together with the current 3% accrual pension. The Association's submission concludes at p. 69:

> Given the close functional/jurisdictional relationship between the duties and responsibilities of Queen's Bench judge and an Alberta Provincial Court judge, when one is seeking to compare the compensation packages of other judges, there is no better comparable salary than that of a Queen's Bench judge. To recommend $210,000 together with a 3.5% accumulation rate pension for Provincial Court judges is reasonable given the salary and pension of Federal judges.

In its submission the Minister points out that with the exception of the New Brunswick Compensation Commission, no judicial compensation commission has acceded to the argument that Provincial Court judges should be paid on parity with federally-appointed judges. Indeed, the *New Brunswick Court of Appeal and Provincial Court Judges' Association of New Brunswick* v. *New Brunswick*, [2003] N.B.J. No. 321 (Minister's Authorities Tab 40) characterized the parity argument as "fundamentally flawed". The Minister's submission outlined a number of reasons as to why the Provincial Court judges should not

be compensated on parity with the superior court judges: First, the Minister submits that the difference between the jurisdiction and role of the provincial and superior court judges are substantial.

We do not accept that submission and there was no evidence before the 2003 Commission that the differences in jurisdiction and role were substantial. In fact, given the expanding jurisdiction of the Provincial Court, the complexity of the legal issues (including Charter issues), and the complexity of dealing with the parties who appear before the Court, there are more similarities than differences.

Second, the Minister submitted that the factors which influenced the proper compensation for superior court judges and Provincial Court judges are dissimilar. Again, we did not find this difference particularly compelling. We did not find a marked difference between attracting outstanding candidates from major metropolitan areas is any different when one compares Toronto and Moose Jaw to Calgary and Red Deer. Indeed this is particularly so given that Calgary lawyers are among the highest paid in the legal profession in Canada. Third, the Minister submitted that recommending a salary already set by a federal commission would be tantamount to surrendering jurisdiction to a body responsible to Parliament and abdicating responsibility to make a decision faithful to local conditions. In support of this submission the Minister relied on *Provincial Court Judges' Association of New Brunswick* v. *New Brunswick*, [2003] N.B.J. No. 321 at para. 156 (Minister's Authorities Tab 40). We agree and accept this submission of the Minister.

The 2003 Commission has noted the compensation, pension and other benefits of the federally-appointed judges, including those who currently sit in the Alberta Court of Queen's Bench, and this is only one of all of the factors which the 2003 Commission has considered pursuant to section 14 of the Regulation.

We also accept the fourth submission of the Minister that the court system is hierarchal in structure. It is recognized and accepted that the Supreme Court of Canada sits at the apex of the structure. Intermediate appeal courts, superior courts and provincial courts or their equivalent complete the model. A court faced with a problem previously resolved by a court higher in hierarchy must follow the precedent established by the higher court. We have noted the conclusion of the 1998 Alberta Judicial Compensation Commission that:

> We believe [the historical hierarchy] should continue to be observed ... and that "there are gradations of judicial responsibility and, as is generally the case, with greater responsibility goes higher compensation" (Minister's Authorities, Tab 4).

However, contrary to that conclusion we note that Alberta Court of Appeal judges receive the identical salary and pension as Alberta Court of Queen's Bench judges, and only the Supreme Court of Canada judges are paid at a higher level.

We have also noted from the Minister's submission that the 1998 Ontario Provincial Judges Remuneration Commission believed that:

> The differential treatment of Federal and Provincial judges promotes the perception of a two-level system of justice" and refer to the continued existence as intolerable because Provincial Courts "are vested with the jurisdiction over the most vital matters

> between the citizen and the State – the criminal law. (Minister's Authorities, Tab 11).

However we accept the Minister's submission that the 1998 Ontario Commission failed to explain why it believed that the public perceived a "two-level system of justice" to exist. If such a perception does exist, and there is no clear evidence that it does, there is no evidence that such a perception would be cured by providing parity of salary, pensions and benefits as between the Alberta Provincial Court judges and the federally-appointed Queen's Bench judges. In fact, the perception may still continue to exist (if it does at all) merely by the fact that the Court of Queen's Bench is described as the superior court.

In conclusion, in recommending the appropriate compensation, pension and benefits we have considered the compensation of other judges in Canada, including that of the federal judges, as well as the judges of the other provincial courts in Canada. We accept the Association's submission that the most relevant comparators are Provincial Court judges in Ontario and the federally-appointed judges. However, this was only one factor considered among those listed in section 14 of the Regulation.

(f) the growth and decline in real per capita income

In the Minister's submission, it noted the 1998 Alberta Commission conclusion that the Alberta economy was the "strongest economy in Canada". The Minister accepts that this is still the case. The Minister of Finance, in her April 8, 2003 budget speech reported that "Alberta has the strongest economy in Canada" and

predicted that "we're going to keep it that way". The Minister of Finance, Alberta 2003 Budget Speech (Minister's Authorities, Tab 53).

The Minister also agreed that a strong economy is objective evidence of the ability of the residents of Alberta as taxpayers to shoulder the responsibility for judicial compensation. The Minister submitted that Albertans can afford to pay judges of the Alberta Provincial Court at the level proposed by the Minister of Justice.

In the Association's submission, we accept the evidence that Alberta's gross domestic product per capita is the highest in Canada, and Alberta has the highest personal income per capita. We also accept that the Association's submission that the financial situation of the Government of Alberta is better than that of all provinces as well the Government of Canada. The Alberta 2003 budget states that the Alberta Government will create a "cash cushion" of $268,000,000 in 2003-2004 and averages of about $240,000,000 for the following two years. We therefore accept the Association's submission in light of the above there is no financial impediment to the Province of Alberta paying its judges the salary as recommended by the Association of $210,000 per annum, together with an appropriate pension.

(g) the need to provide fair and reasonable compensation for judges in light of prevailing economic conditions in Alberta and the overall state of the economy

The Association in its submission recognized that if Alberta economic conditions are very good, this factor by itself does not mean that judges should receive

more in salary and pension than is appropriate in light of the other criteria. We accept that submission. We have noted the following statements from the Alberta 2003 budget referred to in the Association's brief at pp. 73 to 74:

Alberta's economy grew 12% from 1999 to 2001 (Alberta 2003 Budget, Government Business Plan, p. 27)

Alberta's economy is forecast to grow 3.6% for 2003 and 2004 and at 3.2% in 2005 and 2006 (Alberta 2003 Budget, Fiscal Plan 2003-2006, p. 31)

Alberta's economy has continued to maintain steady growth (Alberta 2003 Budget, Alberta Advantage, p. 105)

Alberta has the highest real gross domestic product per capita among the provinces (Alberta 2003 Budget, Alberta Advantage, p. 105)

In conclusion, we have noted that Alberta's economy is strong, the strongest in Canada, and that that is likely to be maintained for the duration of our mandate. We have considered the prevailing economic conditions in Alberta and the overall state of the economy in recommending fair and reasonable compensation for Alberta Provincial Court judges.

(h) the cost of living index and the position of the judges relative to its increases

We accept the Association's submission that the Alberta CPI has risen since judges' incomes were last increased in April, 2000. The increase in the Alberta CPI for April, 2000 to April, 2001 was 3.5%. From April, 2001 to April, 2002 it

was 2.3%. From April, 2002 to April, 2003 it was 3.41%. The Association's submission concludes that the overall increase in the Alberta CPI is 9.2% since the Provincial Court judges last received an increase in income.

We accept the submission of the Minister, however, and the conclusions of the 2000 Alberta Judicial Compensation Commission and the 1999 Saskatchewan Provincial Court Commission which concluded that increases in the cost of living criteria did not, in most circumstances, merit extensive consideration.

(i) the nature of the jurisdiction of the court

This Commission considered the nature of the jurisdiction of the Alberta Provincial Court. The Association's submission addressed in detail the significant increase in jurisdiction of the Alberta Provincial Court. The following is a summary of the jurisdiction of the Provincial Court, including increased statutory jurisdictional responsibilities:

Criminal Jurisdiction

All criminal prosecutions commence in Provincial Court; 97% conclude in Provincial Court and only 3% conclude in the Court of Queen's Bench. Even for those offences that are tried in the Court of Queen's Bench, a preliminary inquiry is held in the Provincial Court in order to determine if there is sufficient evidence to warrant ordering the accused to stand trial.

- There are few indictable offences that do not give an accused the right to be tried in the Provincial Court. The Court of Queen's Bench is said to

have exclusive jurisdiction over these few offences. Almost always it is the criminal offence of murder. The others are exceptionally rare: treason, alarming Her Majesty, intimidating Parliament or a legislature, mutiny, seditious acts, piracy, crimes against humanity, and bribery of a judicial officer.

- The Provincial Court initially handles all the criminal prosecutions in the province, and, on average, no less than 97% of the cases concluded in a year will be disposed of in the Provincial Court either by trial, or by sentencing after guilty plea.

- There has been a regular pattern of Parliament moving offences from the exclusive jurisdiction of the Court of Queen's Bench to the hybrid category, and from the hybrid category to offences of absolute jurisdiction of the Provincial Court.

- A number of new offences and issues have been added to the court's jurisdiction pursuant to the *Criminal Law Amendment Act*, 2001 (Bill C-15A).

- *The Victims Restitution and Compensation Payment Act*, S.A. 2001, Ch. V-3.5 will have a significant impact on the work of the Provincial Court. The Act has been passed, but not yet proclaimed.

- The Provincial Court has jurisdiction over all provincially-legislated offences.

Civil Jurisdiction

- In 2002 the monetary jurisdiction of the Provincial Court – Civil Division was increased to $25,000, with authority of the Lieutenant Governor in Council to authorize the Provincial Court to hear civil claims of a monetary value of up to $50,000.

- The Provincial Court's remedial jurisdiction has been expanded.

- The Provincial Court has concurrent jurisdiction with Court of Queen's Bench over matters involving the *Residential Tenancies Act* and the *Mobile Home Sites Tenancies Act*.

- The *Justice Statutes Amendment Act, 2000* (proclaimed January 22, 2001), conferred upon the Provincial Court the power to find individuals before it in contempt of court for failing to comply with orders given by the court.

Expansion of Family and Youth Jurisdictions

- In Canada, youth justice law is undergoing substantial change and reform with the enactment of the new *Youth Criminal Justice Act* which came into force on April 1, 2003 replacing the *Young Offenders Act* of 1984. Consistent with the submissions of the Association, and the evidence of Judge Cooke-Stanhope, the 2003 Commission accepts that this new Act is extremely complex, about three times the size of the *Young Offenders Act*, and changes many of the principles and specific rules that govern

youth justice issues. This Act also has the potential to add to the workload, stress and complexity in dealing with youth offenders. The Alberta Provincial Court has exclusive jurisdiction over all child protection proceedings.

Family Matters

- Since the 1998 Commission, when the family jurisdiction of the court was last reviewed, there has been a significant increase in jurisdiction of the Provincial Court resulting from the *Protection Against Family Violence Act*, proclaimed June 1, 1999.

We also accept the evidence of witnesses called by the Association that the judges have expanded their duties through the judicial dispute resolution process. This has made the court process more meaningful where a judge presides in an informal alternative dispute resolution process and, through a very effective process, permits all of the parties affected by the judicial process to fashion a remedy which is acceptable to them and in which they play a significant part. This process has made the judicial system more efficient and effective. However, for the process to work the judges must make themselves available on an urgent basis to deal with difficult and urgent cases. The judges recognize that "justice delayed is justice denied", and we have heard evidence on how the judges make themselves available to the parties who must access and are affected by the judicial system in Alberta. This is particularly challenging for circuit judges who often must sit extended hours while on circuit, or offer

limited available time at their home jurisdiction to litigants who are in need of immediate resolution of disputes.

We have considered the nature of the jurisdiction of the court, and the expanding jurisdiction and responsibilities of the Provincial Court judges in recommending the appropriate salary, pensions and benefits for the period from April 1, 2003 to March 31, 2006.

(j) the current financial position of the government

We accept the Minister's submission that Alberta has the resources necessary to cover the cost associated with increased compensation to Alberta Provincial Court judges and Masters in Chambers proposed by the Minister. The Minister submits that the Government of Alberta is in an enviable position. According to Alberta's fiscal plan 2003 to 2006, "With net financial assets and the lowest overall tax burden in the country, Alberta by far has the strongest financial position of any government in Canada". Minister of Finance, Alberta 2003 Budget Fiscal Plan 2003-2006, at 8 (Minister's Authorities Tab 55). We also accept the Minister's submission that although Alberta's economic outlook is among the rosiest in Canada, there are several factors which underscore the need for a fiscally responsible financial plan for Albertans. The 2003 Commission has therefore considered the current financial position of the Government in its recommendations as to appropriate salary, pension and benefits.

VI. RECOMMENDATIONS

The following are the recommendations of 2003 Commission, together with a brief summary of the reasons.

A. Salaries

We recommend payment of the following annual salary for Alberta Provincial Court judges:

Annual Salary

Period	Salary
April 1, 2003 – March 31, 2004	$200,000
April 1, 2004 – March 31 2005	$210,000
April 1, 2005 – March 31 2006	$220,000

The current salary of Albert Provincial Court judges has been $170,000 since April 1, 2000. The Commissioners recognize the importance of raising the salary for a number of reasons, including the need to **maintain** the independence of the Court and the judges, the expanded jurisdiction of the Provincial Court, the increasing complexities of the cases before the court, the need to maintain a strong court by **continuing** to attract highly qualified applicants for the foreseeable years, the compensation of other judges in Canada, the need to provide fair and reasonable compensation for Alberta judges in light of prevailing economic conditions, the excellent state of the

Alberta economy and the government's financial position. No one factor was determinative.

In regard to the need to continue to attract highly qualified applicants, we were pleased to note the excellent quality of candidates appointed in the past two years. We have little doubt that the Alberta commission process has contributed to that desired objective. We want to ensure that it continues. We also want to ensure that the Provincial Court bench continues to be an attractive career choice for lawyers currently in private practice in both Calgary and Edmonton. We believe that our salary recommendations will accomplish that objective.

Our major comparatives were the federally appointed judges and Ontario Provincial Court judges. However, these salaries were used as a guide only. We recognize some Alberta lawyers will prefer an appointment to Queen's Bench and that compensation alone will not prevent that. However, it is important to ensure that the financial gap is not a large one. The hierarchical structure of the court, and the differences in their jurisdiction, do not in our view justify any significant difference in salary and benefits. The roles, responsibilities, and various duties are very similar whether they "hang their hat" at the Court of Queen's Bench or the Provincial Court. In fact, in many individual cases, the hats of the Provincial Court judges are hung earlier in the morning and put on later at night. In conclusion, the similarities are more apparent than the differences.

Effective April 1, 2003 a federally appointed judge receives an annual salary of $216,600 and an Ontario Provincial Court judge receives a salary of $202,500 plus a cost of living allowance. Overall, we recommend that an Alberta Provincial Court judge continue to be paid near the top of the salary scale of Provincial Court judges in Canada.

We also recommend that the salary be increased by $10,000 per annum at the beginning of each fiscal year on April 1, 2004 and then again on April 1, 2005.

We did not feel that there was a need to recommend a change in the salary differentials for the Chief Judge and the Assistant Chief Judges. We therefore recommend that they remain at an additional $15,000 for the Chief Judge and an addition $7,500 for the Assistant Chief Judges.

B. Pensions

We do not recommend any changes to the existing pension plan for Alberta Provincial Court judges. Our recommendation was not influenced by the Minister's submission that the 2003 Commission had no jurisdiction to make retroactive recommendations regarding pension benefits. To be clear, if after considering all of the criteria set out in the Regulation, we determined that the current design and level of judges' pension benefits was not appropriate, we would have recommended changes. However, the 2003 Commission was of the unanimous view that the current design and level of judges' pension benefits are appropriate.

The current pension recommend by the 2000 Commission followed a joint submission of the Association and the Minister. The recommended changes were a significant improvement over the previous pension plan structure. We did not feel, after reviewing all of the submissions in evidence, in reference to the criteria set on section 14 of the Regulation, that there was a need to recommend further changes. We did not feel that there were any significant changes over the last three years to justify further improvements. Overall, the pension plan available to Alberta Provincial Court judges permits our judges to retire on an appropriate pension. It may not be as good as the federal judges' plan. However, at the current 3% accrual, an entitlement to a partially indexed pension, at 70% of the best three years' income, will provide for a financially secure retirement.

We accept the Minister's submission that most lawyers going to the bench have had an opportunity to contribute to their RRSP over their working career in private practice. Those who have not chosen to do this, or have not been able to, will still be able to accrue a substantial pension through their years of service on the Provincial Court bench.

We are not prepared to accept the Minister's submission that the Provincial Court judges should contribute more to their own pension plan. Indeed, we felt that would be unfair. We noticed that the Provincial government withdrew $17.1 million dollars from the pension plan when it was in a surplus position. It would therefore be unfair to demand that the judges raise their contribution to their pension plan that is currently in a deficit position according to generally-accepted

actuarial principles. Pension plan performances are typically cyclical with business investments and the performance of the pension plan should improve in the future. Also, we reject the request of the Association to initiate immediate repayment of prior pension contributions.

C. Other Benefits and Allowances

1. Long Term Disability

We recommend that long-term disability benefits be indexed at 60% of the Statistics Canada Consumer Price Index for Alberta commencing on April 1, 2003. This is to alleviate somewhat the erosion of the real value of disability benefits through inflation over time. (The government and the Association may wish to explore tax-free disability benefits, which can be accomplished through the premium paid by the judges or taxed as a taxable benefit. However, this is a suggestion only and is not part of our recommendations.) We do not feel that any other changes are needed pursuant to the criteria set out in section 14 of the Regulation.

2. Professional Allowances

We recommend that the annual professional allowance be increased to $3,000 effective April 1, 2003 as proposed by the Minister. Any unused allowance should not carry over to the next year.

D. Supernumerary Judges

After consideration of all of the criteria set out in section 14 of the Regulation, and the submissions of the parties, we recommend that a supernumerary judge be paid the following for each sitting day or day assigned by the Chief Judge:

Period	Per Diem
April 1, 2003 – March 31, 2004	$1,000
April 1, 2004 – March 31 2005	$1,030
April 1, 2005 – March 31 2006	$1,060

We recommend further that a full day's per diem should be paid, reflective of the lost preparation time, where less than 24 hours' notice of cancellation has been given. We are not prepared to recommend that a supernumerary judge be paid for up to three days of attendance at the Association's formal education programs.

We feel that the additional per diem salary is fair and reasonable given the demands placed on the supernumerary judges who perform a valuable service in relieving a court of its heavy caseload. We are optimistic that the increased per diem rate will facilitate the creation of a pool of supernumerary judges who can be assigned by the Chief Judge and the Assistant Chief Judges as required.

We also think that it is fair and reasonable to provide the full day's per diem where less than 24 hours notice of cancellation has been given for all of the reasons provided by the Association in its submissions.

E. Reappointed Judges

Based on the submission of the Minister, and noting that the Association has no objection to this proposal, the 2003 Commission recommends that a benefit program be implemented based on the proposals outlined under the "Judges 70 + Benefits Program", subject to the change noted below.

It is the recommendation of the 2003 Commission that a judge who has been reappointed by the Lieutenant Governor in Council be given the right to change coverage only at "choice times" as described in the Alberta Personnel Office document entitled "1st Choice: A benefits program for managers and non-union employees" and not on an annual basis.

F. Benefits For Retired Judges And Supernumerary Judges

Based on the submission of the Minister, the 2003 Commission recommends that the Minister explore two options regarding benefits for retired judges.

Under the first option coverage could be provided under a program separate from the senior civil servants group health plan under an administrative services only arrangement. The premium rates for this option would be at a level that covers the costs associated with the experience of the group of supernumerary and retired judges plus administrative costs. There would be predetermined participation rules and some coverage may not be available or limited.

As a second option a health benefits package should be designed and insurers and providers of group health plans should be invited to provide proposals.

Premiums for whichever option is chosen would be the responsibility of the supernumerary and retired judges and would be deducted from any pension benefits received.

G. Motor Vehicle Expense

The 2003 Commission does not recommend any changes to the mileage of $0.38 per kilometre that the government set for all of its employees as of April 1, 2003. That mileage rate may be changed at the discretion of government as it has in the past. However, we do recommend that Provincial Court judges that travel on circuit are reimbursed for the entire cost of any extra insurance premium on their own vehicles for business use over and above the cap for reimbursement established by the government at $300 per year.

H. Clothing Allowance for Masters in Chambers

We do not recommend that a clothing allowance be established for Masters in Chambers. We think that the increase in salary recommended should be satisfactory to deal with any incidental clothing expenses.

I. Costs

For all of the reasons set out in the Association's submission, and in accordance with section 18 of the Regulation, we recommend that the Crown pay the reasonable solicitor and own client costs, including all reasonable disbursements, incurred by the Association in preparing for and making written and oral submissions to the 2003 Commission. The submissions from both

counsel for the Association and for the Minister were extremely helpful to the 2003 Commission and significantly contributed to facilitating the deliberations of the 2003 Commission and assisting the Commissioners in making a timely decision and providing its recommendations to the Minister.

If the Association and the government cannot agree on the reasonableness of the costs, then the Bill of Costs can be referred back to the 2003 Commission for a determination. In that case, we will hear from counsel for the Minister and the Association prior to making our assessment. In conclusion, the Commissioners pray that these recommendations be accepted by the Lieutenant Governor in Council and implemented at the earliest possible date in the interests of the judges of the Provincial Court and in the interests of the people of Alberta.